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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1853

DURHAM DISTRIBUTORS, INC. and
WATERCRAFT SALES CENTER, INC.,
Petitioners,

v.

BOMBARDIER LIMITED and BOMBARDIER EAST,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN VANDERSTAR
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 452-6072

Of Counsel:

PAUL B. GALVANI
ROPES & GRAY
Boston, MA 02110

PAUL V. DONAHUE
98 Bartlett Avenue
Pittsfield, MA 01201

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COUNTERSTATEMENT OF QUESTION PRESENTED

When two manufacturers agree to divide markets and one of them terminates its distributor, do customers of the distributor who purchase the product for resale have standing to sue the manufacturers for treble damages under Section 4 of the Clayton Act?

COUNTERSTATEMENT OF THE CASE

Of the more than 500,000 small motorcycles sold annually in the United States from 1967 to 1970, an Italian manufacturer, Agrati-Garelli, S.p.A., sold between 2,000 and 3,000 a year to Engine Specialties, Inc. ("ESI"), its

exclusive distributor in North America. ESI, in turn, sold the Agrati small motorcycles, along with numerous other recreational products, to nine or ten wholesalers and a number of hardware stores, filling stations, sporting goods shops and other retail dealers. A total of approximately 1100 dealers sold ESI's products at retail.

Two such wholesalers were petitioner Durham in New England and petitioner Watercraft in Michigan. ESI's contract with Durham was made in 1968 but was not reduced to writing until November 1970; Durham never was successful as a distributor of recreational products and went out of business in 1972. ESI's contract with Watercraft was made in August 1970 and was revised in April 1971; Watercraft never established any track record as a motorcycle distributor, although its overall business continued to be profitable.

In August 1970, Agrati approached respondent Bombardier, a large Canadian snowmobile manufacturer, to discuss a joint marketing and manufacturing arrangement for small motorcycles. Bombardier was interested because it had been looking for a summertime product and had hand-built a crude prototype of a small motorcycle. ESI knew of this discussion and became aware of further discussions between Agrati and Bombardier. In October 1970, Agrati wrote ESI terminating its exclusive distribution contract effective the following May, and in November 1970, Agrati terminated ESI's contract effective immediately. Agrati appointed Bombardier its exclusive distributor in North America. Bombardier ordered 7800 small motorcycles for distribution during the 1971 spring season.

Even though ESI first became aware in September 1970 of the possibility that ESI might be replaced by Bombardier as Agrati's North American distributor, it failed to inform either Durham or Watercraft. In fact, even after ESI had been terminated by Agrati and had

filed this suit, it still did not inform Durham or Watercraft of its loss of the Agrati product line.

When Bombardier replaced ESI as Agrati's exclusive North American distributor, Bombardier, lacking any prior experience in selling motorcycle products, decided to test market the Agrati small motorcycles in 1971 in four areas in which its distributors were wholly-owned subsidiaries: Southern New England, Quebec, Ontario, and California. This decision was not based upon the status of ESI's distribution network in those four areas, and indeed there was no evidence that Bombardier had any knowledge of who ESI's distributors were, where they sold, or anything else about ESI's distribution. Later in the spring of 1971, sales of the Agrati-made motorcycles were going badly (especially in Southern New England), and Bombardier attempted to cut back its order from Agrati by 1,000 vehicles. Bombardier also shipped about 100 of the vehicles at a reduced price to an independent distributor, Heath International, which marketed various recreational products in several midwestern states. But again there is no evidence that Bombardier had any knowledge of ESI's distribution in that area.

ESI sued Bombardier in U.S. District Court for tortiously inducing Agrati's breach of contract and for various violations of the antitrust laws. One antitrust claim was that, because Bombardier was a potential entrant into the small motorcycle market, its agreement to serve instead as Agrati's exclusive distributor amounted to a division of world markets. Durham and Watercraft subsequently joined ESI's suit as co-plaintiffs, relying exclusively on the division-of-markets theory. The jury found in favor of all three plaintiffs and found specifically that they were injured by Bombardier's not entering the market with a motorcycle line of its own manufacture.

Although the court of appeals affirmed the verdict for ESI, it reversed as to Durham and Watercraft on the

ground that the Bombardier-Agrati division-of-markets on which antitrust liability was premised was aimed at the manufacturing level and not the distribution level at which Durham and Watercraft operated.

Having ruled that Durham and Watercraft lacked standing, the court of appeals did not reach Bombardier's further argument that as a matter of law the dollar verdict in favor of Durham ($102,000 before trebling) could not be sustained in view of that company's unprofitable history.[1]

The court of appeals granted Durham's and Watercraft's petition for a rehearing but subsequently reaffirmed its holding that Durham and Watercraft lacked standing. Bombardier's petition for certiorari on the application of the *per se* rule against division-of-markets to potential competitors, No. 79-1600, was subsequently denied by this Court on June 3, 1980. Durham and Watercraft filed this cross-petition while Bombardier's petition was pending.

REASONS FOR DENYING THE PETITION

1. Where Two Manufacturers Agree To Divide Markets And One of Them Terminates Its Distributor, The Distributor's Customers Do Not Have Standing To Sue Under Section 4 of the Clayton Act.

Durham and Watercraft's argument rests on the thin thread connecting them to the antitrust violation Bombardier was found to have committed. Their claim stems solely from the fact that Agrati terminated ESI as its

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[1] Even without paying a salary to its owner and chief operating officer, Durham still lost money in 1968 and 1970, earned only $4,718 in 1969, and had a cumulative net loss of approximately $1,600 for the three-year period. Its owner was permitted to testify, however, that his business was worth $75,000.

exclusive distributor in order to effectuate the division-of-markets agreement with Bombardier. As a result of ESI's termination, Durham and Watercraft were no longer able to purchase Agrati small motorcycles from ESI, because ESI no longer had Agrati small motorcycles to sell. Under the case law that fact gives Durham and Watercraft no basis for standing.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ."

The statute specifically limits recovery by requiring that injury occur "by reason of" a violation of the antitrust laws, thus requiring something more than injury incidental to an antitrust violation. *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 419 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Productive Inventions, Inc.* v. *Trisco Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

Moreover, the plaintiff must do more than simply prove he has suffered economic injury; he must prove an antitrust injury—one which "reflect[s] the anticompetitive effect . . . of the violation." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The plaintiff can show such injury by demonstrating in some fashion that he was the "target" of the antitrust violation, either because (1) the violation was "aimed" or "directed" at him, *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956), or (2) the violation threatened a breakdown of competitive conditions at the level of the economy at which the plaintiff operates (the so-called "target area"), *Jeffrey* v.

Southwestern Bell, 518 F.2d 1129, 1130-31 (5th Cir. 1975); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

Accordingly, the courts have consistently denied standing to one who was not a "target" of the violation and who suffered economic damage only by virtue of a relationship with another person who was the "target" of and was directly injured by the antitrust violation. *Martens* v. *Barrett*, 245 F.2d 844, 846 (5th Cir. 1957) (stockholder denied standing); *Deaktor* v. *Fox Grocery Co.*, 332 F. Supp. 536, 541 (W.D. Pa. 1971) (employee denied standing); *Volasco Prods. Co.* v. *Lloyd A. Fry Roofing Co.*, *supra* (supplier denied standing); *Jeffrey* v. *Southwestern Bell*, *supra* (customer denied standing); *see generally* P. Areeda, *Antitrust Analysis* 74-77 (2d ed. 1974); L. Sullivan, *Antitrust* 770-74 (1977).

Petitioners here simply cannot satisfy the threshold standing requirement, however it is stated. Durham and Watercraft, along with large numbers of other subdistributors and dealers, lost business simply because they were customers of ESI. As the court of appeals noted, "Watercraft and Durham belong to the class 'who have suffered economic damage by virtue of their relationship with "targets" . . . rather than by being "targets" themselves.' *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, *supra*, 454 F.2d at 1295." (A35) Durham and Watercraft did not operate at the level of the economy affected by the agreement to divide markets between two manufacturers, Bombardier and Agrati. Indeed, the petitioners operated at a level twice removed from the manufacturing level at which Bombardier and Agrati operated.

Bombardier and Agrati did not seek to restrain trade at the subdistribution level, or to exclude Durham and

Watercraft from the subdistribution market, by agreeing not to compete with each other at the manufacturing level. There is no evidence that Bombardier knew of Durham and Watercraft's existence or of their relationship to ESI when it entered into the agreement with Agrati. And there is no evidence that the Bombardier-Agrati agreement—which was labelled as a *per se* violation—had any anticompetitive effect. Agrati's products had accounted for about one-half of one per cent of the small motorcycle market. Moreover, notwithstanding petitioners' repeated mischaracterizations to the contrary, neither Durham nor Watercraft was foreclosed from the small motorcycle market. They simply lost their ability to purchase Agrati small motorcycles from ESI. Nothing in the record indicates that Durham and Watercraft could not have obtained small motorcycles from any of the numerous other manufacturers.

The court of appeals recognized that even ESI could not premise its standing on the contention that it operated in the target area of the division-of-markets violation and concluded that ESI had standing only because ESI's elimination as "Agrati's distributor was necessary to effectuate the territorial scheme" between Bombardier and Agrati. (A35) Durham and Watercraft, however, were never in such a position, and their only connection to the violation is through their contractual right to purchase Agrati small motorcycles from ESI. No case cited by petitioner could support standing on such a thin thread.

2. The Decision Below Is Consistent With The Decisions Of Other Courts of Appeals.

The court below ruled that Durham and Watercraft lacked standing because the division-of-markets agreement was not directed or aimed at them nor at the level of the economy in which they operated. Petitioners contend, however, that the decisions of other courts of ap-

peals would support their standing because their injury was foreseeable and "they were in the area of the economy which the defendant's conduct was intended to affect." (Pet. at 16)

There is no such conflict. Indeed, the decisions on which petitioners rely simply do not support their standing. In *Solinger* v. *A&M Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979), for example, the plaintiff, who had negotiated the purchase of a record distributorship, refused to agree with territorial restrictions the defendant record manufacturers sought to impose on their distributors. As a result, the distributorship was terminated by the defendants. The court found the plaintiff had standing because the conspiracy specifically sought to impose territorial restrictions on record distribution and because the defendants' refusal to deal with the plaintiff foreclosed him from the market. *Id.* at 1311. Here, Bombardier and Agrati's agreement to divide markets did not restrain trade in the distribution of small motorcycles, did not result in a refusal to deal with Durham and Watercraft, and did not foreclose them from the small motorcycle distribution market.

Durham and Watercraft also cite *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955), but that case does not help them and indeed supports our position. In *Karseal*, Richfield and independent service station operators entered into contracts for the exclusive sale of automobile accessories sponsored by Richfield. Karseal, a manufacturer of a car wax not sponsored by Richfield, alleged that this practice caused a reduction in its sales through the same independent stations. The court found that Karseal had standing because the purpose of the conspiracy was to exclude products such as Karseal wax from the Richfield distribution system. 221 F.2d at 364. It is true, as Durham and Watercraft state,

that in *Karseal* the plaintiff was not in direct competition with the defendant. Bombardier and ESI likewise have never competed for the sale of small motorcycles either to Bombardier distributors or to ESI distributors, but ESI, like Karseal, had standing to sue because it was the object of the alleged conspiracy, under the theory adopted by the court of appeals, because its termination as Agrati's distributor was necessary to effect the division of markets. On the other hand, there is no evidence suggesting that the conspiracy here was intended to restrain trade in the distribution of small motorcycles or to foreclose Durham and Watercraft from the small motorcycles distribution market. Thus, *Karseal* does not support petitioners' standing.

Petitioners' reliance on the "foreseeability" of their injury is misplaced. The decisions on which they rely stress foreseeability not to imply that a plaintiff has standing for any injury, however remote, if the effect of the violation on the plaintiff was foreseeable, but to limit standing to those within the area of the economy foreseeably affected by the violation. Thus, in *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964), the court found that a film producer seeking to exhibit its films was within the area of the economy foreseeably endangered by the defendant's violations aimed at restricting the market for the exhibition of films.

In short, while the articulation of the rule of antitrust standing may vary from case to case, the courts consistently seek the same objective—to determine whether the plaintiff's injury was caused "by reason of" the alleged antitrust violation and was not merely incidental to it. However the rule is formulated, customers lack standing to sue when their supplier loses its exclusive distributorship with a manufacturer when that manufacturer enters

into a division-of-markets agreement with another manufacturer.[2]

3. The Peculiar Facts Of This Case Do Not Permit The Formulation Of A Rule of Standing Capable of Broad Application.

This case involves a unique situation: A manufacturer, Agrati, and a potential manufacturer, Bombardier, were found to have violated a newly-fashioned version of the *per se* rule against horizontal division of markets when they entered into a joint venture and agreed not to compete with each other. In order to effectuate that agreement Agrati terminated its exclusive distributor in the United States, ESI. ESI's standing, according to the court of appeals, derives from the fact that its exclusive distributorship stood in the way of the division of markets. Petitioners, however, occupied no such position. They bought Agrati small motorcycles from ESI for resale to retailers, and when ESI was terminated they lost that source of supply. The unusual circumstances of this case not only make clear the attenuated basis for petitioners' claim to standing but also show that the case provides a limited vehicle for the formulation of a rule of standing capable of broad application.

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[2] Petitioners also contend that the Court should grant the petition because the court of appeals misconstrued Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Yet, as petitioners concede, the court of appeals found *Illinois Brick* not "directly applicable." Thus their contention that the court of appeals' reference to *Illinois Brick* provides "separate" grounds for the petition is simply unfounded.

CONCLUSION

Accordingly, for all of the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

JOHN VANDERSTAR
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 452-6072

Of Counsel:

PAUL B. GALVANI
ROPES & GRAY
Boston, MA 02110

PAUL V. DONAHUE
98 Bartlett Avenue
Pittsfield, MA 01201

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